7-29-2014

State v. Colvin Respondent's Brief Dckt. 41762

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Appellant, vs. GAYLORD JAY COLVIN, Defendant/Respondent.	No. 41762 Nez Perce Co. Case No. CR2013-676

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

HONORABLE JEFF P. PAYNE, Magistrate Judge
HONORABLE CARL B. KERRICK, District Judge

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I.
STATEMENT OF THE CASE

Respondent Gaylord Jay Colvin (Jay Colvin) was arrested for Driving While Under the Influence of Alcohol (DUI) in violation of Section 18-8004 of the Idaho Code. He was stopped for failing to signal when two lanes merged into one while he continued to travel in the right lane, an alleged violation of Section 49-808 of the Idaho Code. (R., pp. 7-11)

The stop was based solely upon the alleged violation of Section 49-808 of the Idaho Code (R., p. 9) which statute is unconstitutionally void because it failed to provide fair notice that signaling is required when roadway design results in two lanes down to one and that same section is unconstitutionally void as applied because it fails to establish minimum guidelines as to what is an "appropriate signal" to govern enforcement of the statute.

Jay Colvin caused to be filed several pretrial motions, pertinent for purposes of this appeal was a Motion to Suppress based upon application of Article 1 Sections 13 and 17 of the Constitution of the State of Idaho as well as the Fourth and Fifth Amendments to the Constitution to the United States of America (R., pp. 52-53).

On January 28, 2013, at a little before 10:30 p.m. Idaho State Trooper Jeffory Talbott stopped a vehicle operated by Jay Colvin (Tr. P.8 ll. 5-7)

The sole basis supplied by Talbott was: "As I was behind the pickup, it appeared to be weaving in its lane and traveling 30 miles per hour (mph) in the posted 35 MPH zone. The pickup then activated its right hand turn signal and moved into the right hand lane as we passed a traffic sign indicating the right hand lane was ending. The pickup continued south and merged back to the left in front of me without signaling. I activated my vehicle's overhead emergency equipment...". (R., p. 9)

All of the foregoing appears on video from the "dash cam" video in Talbot's patrol vehicle and fails to support any contention of weaving. (Defendant's Exhibit A) (Tr. P.7 ll. 19-20). Further testimony was adduced that indicated the vehicle operated by Jay Colvin was an older model small pickup and would not go up 5th Street Grade (location of the stop) any faster than 30 mph which is why Jay Colvin pulled over to the right (actually changed lanes with a signal) to let the car behind him (Talbott) pass, and Talbott chose not to pass. (Tr. P. 33 ll. 3-10)

There is evidence showing that no discernible leftward movement or motion is required for a vehicle to continue straight forward down 5th street. Further that no "turn" is required. (Hearing Exhibits A and C) (Tr. P. 35 L. 4 – P. 40 L. 20)

As background regarding the prelude to the stop of Jay Colvin, Officer Talbott testified he had followed and/or observed the Colvin vehicle for approximately four (4) miles and through the following discourse between counsel and Officer Talbott during the suppression hearing offered the following:

> Q. And would you tell me if there's anything in that probable cause affidavit indicating that the vehicle was travelling at 30 miles an hour in a 35-mile-an-hour speed zone?
>
> A. No.
>
> Q. And is there anything in that probable cause affidavit indicating that you had followed that vehicle through three turns and four miles?
>
> A. Would have been two turns and four miles, but no.
>
> Q. Well, it turned out on 21st Street - - from 8th to 21st, correct?
>
> A. Yes.
>
> Q. And then it turned off of 21st onto where?
>
> A. It was either 16th or 19th Avenue.
>
> Q. And then it turned off of 19th onto 5th - - or whatever the - - 17th, correct?
>
> A. Correct.
>
> Q. That's three turns.
>
> A. You said when I followed it. It - - as I was following it, it only made two turns.

Q. You observed it making three turns?

A. Yes.

Q. It doesn't say anything in that affidavit about that, does it?

A. No.

Q. The only thing it says in that affidavit is you stopped the vehicle for failure to - - failure to signal when merging, correct?

A. Correct.

(Tr. P.12 L.22 – P.13 L. 25)

After having followed Jay Colvin for the approximate four miles and observing three different turns with no apparent illegality Officer Talbott can be heard on Defendant's Exhibit A stating at the time of initiating the stop: "Didn't signal".

II.
ARGUMENT

A.
SECTION 49-808(1) OF THE IDAHO CODE IS UNCONSTITUTIONALLY VOID

As a starting point the entire case must be filtered by consideration of the following:

> "Traffic stops constitute seizures under the Fourth Amendment." *State v. Henage*, 143 Idaho 655, 658, 152 P.3d 16, 19 (2007). Limited investigatory detentions are permissible when justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime. *State v. Bishop*, 146 Idaho 804, 811, 203 P.3d 1203, 1210 (2009). "Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts." *Id.* Reasonable suspicion requires more than a mere hunch or "inchoate and unparticularized suspicion." *Id.* (quoting *United States v. Sokolow*, 490 U.S. 1, 7, (1989)). The test for reasonable suspicion is based on the totality of the circumstances known to the officer at or before the time of the stop. *Id.*

State v. Morgan, 154 Idaho 109, 112, 294 P.3d 1121, 1124 (2013)

The due process clause of the Fourteenth Amendment to the U.S. Constitution requires that a statute defining criminal conduct be "worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited" and that it be "worded in a manner that does not allow

arbitrary and discriminatory enforcement." *State v. Korsen*, 138 Idaho 706, 711 69 P.3d 126, 131 (2003).

Therefore, a statute is void for vagueness if it "fail[s] to provide fair notice that the defendant's conduct was proscribed or fail[s] to provide sufficient guidelines such that the police had unbridled discretion" in enforcing the statute. *State v. Korsen*, 138 Idaho at 712, 69 P.3d at 132. The statute involved in this matter, I.C. § 49-808(1) is unconstitutionally void for both reasons.

A statute is facially vague if it is "impermissibly vague in all of its applications," i.e. invalid *in toto*. However, even if a statute is not facially vague it may still be vague "as applied" to a particular defendant's conduct. *State v. Korsen*, 138 Idaho at 712, 69 P.3d at 132.

Section 49-808(1) of the Idaho Code states:

> No person shall turn a vehicle onto a highway or move a vehicle right or left upon a highway or merge onto or exit from a highway unless and until the movement can be made with reasonable safety nor without giving an appropriate signal.

The Idaho Court of Appeals in *Burton v. State*, 149 Idaho 746, 748, 240 P.3d 933, 935 (Ct.App. 2010) in construing said statute under remarkably similar circumstances to these of the case at bar states:

> Due process requires that all "be informed as to what the State commands or forbids" and that "men of common intelligence" not be forced to guess at the meaning of the criminal law. *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 1248, 39 L.Ed.2d 605, 612 (1974); *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998). Accordingly, the void-for-vagueness doctrine, premised upon the Due Process Clause of the Fourteenth Amendment, requires that a statute defining criminal conduct or imposing civil sanctions[fn1] be worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited, and the statute must be worded in a manner that does not allow arbitrary and discriminatory enforcement. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497-99, 102 S.Ct. 1186, 1192-94, 71 L.Ed.2d 362, 370-72 (1982); *State v. Korsen*, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003); *State v. Martin*, 148 Idaho 31, 34, 218 P.3d 10, 13 (Ct.App. 2009). Thus, a statute may be void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes or if it fails to establish minimal guidelines to govern law enforcement or others who must enforce the statute. *Korsen*, 138 Idaho at 712, 69 P.3d at 132; *Martin*, 148 Idaho at 35, 218 P.3d at 14.

The court continues and holds:

> This vagueness in application occurs because the statute does not specify how much or what type of movement to the left or right is necessary to trigger the duty to signal. Admittedly, a very literal interpretation of the statute might lead to a conclusion that a signal is required when two lanes simply merge because a driver in either lane must move the steering wheel at least slightly in order to steer into the emerging lane. But the statute cannot reasonably be given an utterly literal application to *every* type of side-to-side movement, for a vehicle literally moves to the left or the right when a driver weaves a bit within his or her lane or simply negotiates a bend in the road, but no one would contend that a signal is required in those instances. It is simply not apparent from the language of Section 49-808(1) whether a signal is required when two lanes blend into one. Persons of ordinary

> intelligence can only guess at the statute's directive in this circumstance. Therefore, the statute is unconstitutionally vague as applied to Burton's conduct.
>
> Because Section 49-808(1) could not be constitutionally applied to her, Burton has shown that no legal cause existed to effectuate the traffic stop that led to her breath tests.

Burton v. State, 149 Idaho at 749-750, 240 P.3d at 936-937.

Obviously, the *Burton* holding overruled *State v. Dewbre*, 133 Idaho 663, 971 P.2d 388 (Ct. App. 1999) under circumstances herein. The *Burton* court stated:

> This Court addressed a related but distinct issue in *State v. Dewbre*, 133 Idaho 663, 991 P.2d 388 (Ct.App. 1999). The driver there contended that the signal requirement defined in Section 49-808 did not apply where a two-lane portion of a highway ended and two traffic signs as well as painted arrows on the highway advised motorists that the right lane was ending and traffic should merge left. The *Dewbre* case generated a separate opinion from each of the three Court of Appeals judges. The lead opinion stated that the signal requirement applied in that circumstance. A second judge concurred in that result but did not join in the lead opinion's reasoning, and the third judge dissented. The *Dewbre* opinion does not have precedential value bearing upon the present case for several reasons. First, the Court in *Dewbre* was not called upon to address the constitutional issue presented here. Second, there was no opinion that commanded a majority, and third, *Dewbre* is factually distinguishable because in *Dewbre*, road signs and arrows on the roadway informed motorists that the right-hand lane was ending and that traffic must merge into the surviving, left-hand lane. In the present case, there is no evidence of such signage or other indicator that one lane was ending and the other surviving.

Burton v. State, 149 Idaho at 749, 240 P.2d at 936.

The crucial element is some distinct movement left or right prior to the requirement of a signal. The position of Jay Colvin is no distinct movement herein was required, and application of the Section 49-808(1) of the Idaho Code is void for vagueness to the circumstances of the case.

Section 49-808 of the Idaho Code was last amended by the legislature in 2005. The *Burton* decision came down in 2010. The legislature has been in session four times since and has done nothing to clarify or remediate the statute's infirmity. One must assume the legislature has at least impliedly placed its seal of approval on the *Burton*, interpretation.

While being required to signal if weaving within a lane or swerving to avoid a deer, are situations that stretch the imagination, going around a bend in the road is not. Proceeding forward on a road that makes anywhere from a 45° to 90° turn is not. Proceeding through the roundabouts that seem to be more and more in vogue is not. In fact, signaling in these latter situations could actually constitute a hazard.

Passing lanes often begin on inclines so slower traffic can stay right. The passing lane then expires at the crest of a grade, where both lanes become one. Thus, it is the lanes that merge and not the driver. It is preposterous to think that a vehicle proceeding forward to the right of a passing lane, who remains in that lane throughout (and may even be passed by other cars) needs to signal to lawfully

continue moving forward. In the present case, Jay Colvin was proceeding down a three lane road, moved to the right-hand lane and continued in that lane, never changing direction, exiting or merging.

Further, because the term "appropriate signal" is not defined in the Idaho Code, a person of ordinary intelligence is left to wonder when a signal is appropriate and, therefore, required. The vagueness doctrine does not require every word in a criminal statute to be statutorily defined. *State v. Casano*, 140 Idaho 461, 464 95 P.3d 79, 82 (Ct. App. 2004). However, "a statute must be construed so that effect is given to every word and clause of the statute" and "words and phrases are construed according to the context and the approved usage of the language." *State v. Dewbre*, 133 Idaho 663, 665, 991 P.2d 388, 390 (Ct. App. 1999). Therefore, effect must be given to the word "appropriate" as it is used in this statute.

"Appropriate" is defined as "suitable or fitting for a particular purpose, person, occasion" (http://www.dictionary.com, accessed July 23, 2014) or "suitable for the occasion or circumstances" (http://www.encarta.msn.com, accessed Oct. 15, 2009). Therefore, inclusion of the word "appropriate" in the statute implies that there are situations in which the use of a signal is not appropriate. However, because the statute provides no definition of the term

"appropriate signal," (e.g. when other traffic is present and your "movement" could impede or interfere with their "movement"), people of ordinary intelligence are left to wonder when a signal is appropriate. In fact, there are many situations, including the one presently before the court, in which "the appropriate signal under the circumstances was just as likely no signal at all."

Jay Colvin was traveling in the right-hand lane of a road that narrowed from three lanes to two. Therefore, the design of the road forced Jay to continue forward in the same direction without turning as the two lanes became one. While the lanes *merged* (in a manner of speaking), Jay Colvin no more merged or changed lanes by remaining in the right-hand side than someone in the left-hand lane in the same place may have merged or changed lanes. Thus, it becomes an issue of who (in the two lanes) becomes the merger, changes direction or changes lanes. The result would actually require parties in both lanes to signal. Hence, one could envision a situation where a driver in the left-hand lane would signal a right-hand turn and a driver in the left-hand lane would signal to turn left, even though both continued in the same direction with neither turning.

There was no other traffic in the vicinity at the time whose travel was potentially impeded or interfered with by Jay Colvin's action. Therefore, it is likely that the "appropriate signal" in this situation was no signal at all. However,

because the statute fails to provide notice to people of ordinary intelligence whether the terms "movement" and "appropriate signal" include such situations, it is unconstitutionally vague as applied to this situation and, therefore, void.

B.

SECTION 49-808(1) OF THE IDAHO CODE IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO THIS CASE BECAUSE IT FAILS TO PROVIDE SUFFICIENT GUIDELINES AS TO WHEN A SIGNAL IS APPROPRIATE THEREBY GIVING POLICE UNBRIDLED DISCRETION IN ENFORCING THE STATUTE.

A law that does not provide minimal guidelines for enforcement "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *State v. Bitt*, 118 Idaho 584, 586, 798 P.2d 43, 45 (1990). This failure to provide minimal guidelines for enforcement is often "what tolls the death knell" for a statute. *Id.* at n. 4. This is "perhaps the most meaningful aspect of the vagueness doctrine." *Id.* (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

In *Bitt*, a city loitering and prowling ordinance was struck down as failing to provide sufficient enforcement guidelines. *State v. Bitt*, 118 Idaho at 590, 798 P.2d at 49. Under the ordinance, a person could not be arrested or convicted

unless he failed to identify himself and offer an explanation for his presence and conduct. *Id.* However, the ordinance did not provide any guidelines for what constituted credible and reliable identification and, therefore, gave police officers complete discretion to make that determination. *Id.* at 589-590. Although that ordinance was found to be facially void, the reasoning is equally applicable in this "as applied" vagueness challenge.

Section 49-808(1) of the Idaho Code's use of the phrase "appropriate signal" without providing further enforcement guidelines impermissibly gives officers complete discretion to decide who is and who is not violating the statute. Although a facial challenge of Section 49-808(1) of the Idaho Code may not prevail because there are obvious situations in which a person of ordinary intelligence would understand a signal to be appropriate, the statute is vague as applied to Jay Colvin's conduct herein.

As discussed above, there are many situations in which a signal is not necessary. Not only does the statute's failure in defining the phrase "appropriate signal" leave a person of ordinary intelligence wondering when a signal is "appropriate," this failure to provide minimal guidelines provides police with unbridled discretion in determining whether the statute has been violated.

Therefore, Section 49-808(1) of the Idaho Code is unconstitutionally vague as applied to Jay Colvin because it fails to provide minimal guidelines as to when a signal is appropriate thereby giving police officers unbridled discretion in enforcing the statute.

C.
SUPPRESSION IS THE APPROPRIATE REMEDY HEREIN.

The State has raised the spectre the Order of Suppression is not appropriate under the circumstances herein. They cite federal authority for that proposition (*Michigan v. Defillippo*, 443 US 31 (1979)). The United States Supreme Court in that case relies on the concept of "good faith" reliance upon an ordinance in effectuating a stop which had not yet been ruled unconstitutional. It is the position of Jay Colvin application of that ruling is not appropriate to the case herein.

The statute in question had already been ruled unconstitutional in *Burton v. State*, 149 Idaho 746, 240 P.3d 933 (Ct. App. 2010). Therefore the argument Officer Talbott was relying in "good faith" on a statute is inapplicable since it had already been ruled unconstitutionally vague.

The concept of good faith, although perhaps in somewhat different circumstances has not been used by this court as an exception to exclusion of evidence. *State v. Koivu*, 152 Idaho 511, 272 P.3d 483 (2012); *State v. Beesman*,

122 Idaho 981, 842 P.2d 660 (1992). The suppression motion herein relied upon United States Constitution as well as the State Constitution. Use of "good faith" is not appropriate to the case at bar.

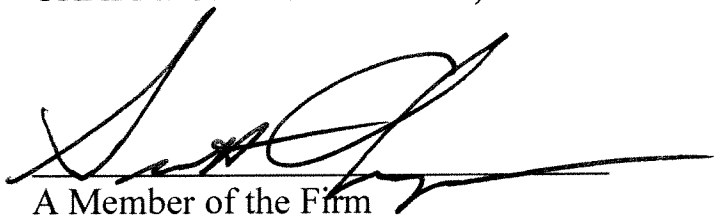
The state is raising for the first time on appeal an issue not raised below. It has long been the ruling of the appellate courts in Idaho that issues not raised below will not be considered on appeal. *State v. Stone*, 147 Idaho 330, 334, 208 P.3d 734, 738, (Ct. App. 2009): *State v. Hedge*, 121 Idaho 192, 195, 824 P.2d, 123, 126 (1992).

IV.
CONCLUSION

For the reasons articulated above, Gaylord Jay Colvin respectfully asks this Court to uphold Judge Kerrick's Order and order the suppression of any evidence obtained as a result of the unlawful stop and/or seizure of Gaylord Jay Colvin.

RESPECTFULLY SUBMITTED this 25th day of July, 2014.

CHAPMAN LAW OFFICES, PLLC



A Member of the Firm

I HEREBY CERTIFY that
a true and correct copy
of the foregoing was served on
the following as indicated on
this 25th day of July, 2014

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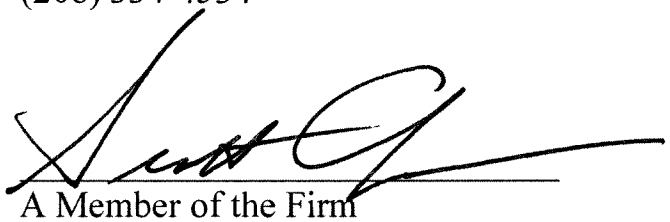

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